85-1298

No.

Supreme Court, U.S.
FILED
JAN 30 1986
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JERRY PAYNE AND DEBORAH PAYNE,
Petitioners,

vs.

CHARLES R. WOOD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Should a bankrupt's children's toys and furniture be included as an asset of the bankrupt's estate?

2. Should casualty insurance policies be included as an asset of the bankrupt's estate?

3. Is there authority in the bankruptcy code or elsewhere for a bankruptcy court to assess a monetary penalty against a bankrupt for omission of items of personal property from his bankruptcy schedule without a finding of fraud, concealment or contempt?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This is a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the final judgment entered in this proceeding on October 18, 1985. A Petition for Rehearing in this proceeding was denied on November 14, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 775 F.2d 202 and appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 18, 1985. A Petition for Rehearing was filed on November 1, 1985 and denied on November 14, 1985. This petition was filed within ninety (90) days of the denial of the Petition for Rehearing. The court's jurisdiction is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Should a bankrupt's children's toys and furniture be included as an asset of the bankrupt's estate?

2. Should casualty insurance policies be included as an asset of the bankrupt's estate?

3. Is there authority in the bankruptcy code or elsewhere for a bankruptcy court to asses a monetary penalty against a bankrupt for omission of items of personal property from his bankruptcy schedule without a finding of fraud, concealment or contempt?

STATEMENT OF THE CASE

On August 12, 1981, Jerry and Deborah Payne filed their Petition for Relief under 11 USC, Chapter 7, in the Bankruptcy Court for the Southern District of Illinois. They were represented by attorney, Lawrence L. Ruemmler, of the Mt. Vernon office of the Land of Lincoln Legal Assistance Foundation, Inc.

On Schedule B-2 (c) the Paynes listed: "a Zenith Stereo, $50.00; a G.E. Refrigerator, $25.00; a G.E. Washer, $15.00; G.E. Dryer, $25.00; furniture, $615.00; household dishes and small appliances, $100.00; and an RCA Color Television, $250.00". (App. 9)

Schedule B-2(e) was not itemized beyond the printed description of "wearing apparel, jewelry, firearms, sports equipment

and other personal possessions" and a value of $125.00 was placed on this category by the Paynes. (App. 9)

On Schedule B-4, the Paynes listed their clothing valued at $125.00 and their "Household Goods, Furniture and Appliances", valued at $1,080.00, as exempt under Chapter 52, §13, Illinois Revised Statutes. (App. 10)

The Paynes were discharged in Bankruptcy on October 26, 1981 and a discharge hearing was held on November 18, 1981.

On december 15, 1981, a fire destroyed the Payne residence (R. 4), and destroyed or severely damaged a majority of their personal possessions. They then filed a claim with the Country Mutual Insurance Company who insured their home and its contents under a replacement value policy of insurance (trustee's Exhibit "A"). The claim filed with the insurance company listed the items lost in complete detail (trustee's Exhibit "B") and valued the items at their depreciated value as determined by the insurance company's rate book. (R. 11, 13-15) In order to receive full replacement value the items had to actually be replaced within a specified period of time (trustee's Exhibit "A").

On February 12, 1982, the trustee petitioned the Court to abandon the Paynes' personal property as "valueless to the estate", and it was allowed.

On February 25, 1982, the trustee filed a Complaint claiming the insurance proceeds for the estate. At that time, the insurance company had already paid $5,000.00 to the Paynes and was prepared to pay an additional $12,389.47 for their personal property loss. (R. 19)

Also, on February 25, 1982, the Bankruptcy Court entered a preliminary injunction prohibiting the insurance company from paying further sums to the Paynes under their insurance policy.

The Paynes filed their answer on March 17, 1982, and alleged in an Affirmative Defense that $3,664.00 of said amount was

for property acquired after the bankruptcy; that the funds should all be paid to them since the insurance was for replacement value rather than fair market value; and that, by virtue of Chapter 52, §13, Illinois Revised Statutes, all wearing apparel plus $1,300.00 of additional personal property was exempt in bankruptcy.

On April 2, 1982, the Ina State Bank filed a Petition to Intervene in the cause claiming an interest in the insurance proceeds on the house due to a second mortgage. This claim was settled by the parties prior to trial by payment of the entire claim from the insurance proceeds on the residence.

The Paynes also filed a Motion to File a Counterclaim against Country Mutual Insurance Company on November 11, 1982, regarding the loss of their residence. They filed a Motion to File an Amended Counterclaim against the insurance company adding additional claims under the personal property provision on December 9, 1982. The Bankruptcy Court has not ruled on these motions to date.

The claim of the trustee as to the personal property insurance proceeds was tried in a bench trial before the Honorable J.D. Trabue on November 17, 1982.

At trial, the insurance adjuster for Country Companies testified that, under the Paynes' policy of insurance, the insurance adjuster, Bruce Solesby, took the list submitted by the Paynes (Exhibit "B") and figured it at "actual cost value" which he defined as "new cost less depreciation for age, wear and tear, or general condition" (R. 13-15). He did not actually look at all the items (R. 14-17) and only viewed the items to verify the Paynes' list. (R. 25)

The company has a general list of items indicating how much to deduct from the cost of each item as supplied by the insured per year for its life expectancy shown on the list. (R. 14, 27-30) He used this book for all items that were destroyed and a repair

book for repairable items. For items that were not listed in the book he found a similar item of similar cost and extrapolated from that. (R. 20-25) All of his appraisals had been made using the book and the only adjustments were made in negotiations with an insured. (R. 22)

The Paynes' attorney objected to the testimony of the adjuster on the basis that his evaluation testimony was irrelevant and immaterial in that it did not pertain to what the "fair market value" of the items were, but only to what amount the insurance company would pay based upon a depreciation book designed by some unknown employee of the insurance company (R. 36-37), and that the adjuster had not been shown to be qualified to testify to the only material fact: "fair market value". (R. 15-16)

Jerry Payne testified that he listed the items on his Schedule in the groupings that he used on the advice of his attorney (R. 39-40) and that he looked through the local newspaper to attempt to determine values. (R. 40)

The Paynes then called Norman Gillette to testify as to the fair market value of their personal property. Gillette has been a professional auctioneer for 25 years and testified that he appraised personal property 80 to 90 times per year for auctions and for inheritance taxes for banks and attorneys. (R. 49-50)

He then testified that he examined all of the property of the Paynes and made an appraisal of its fair market value; meaning the price that a willing buyer would pay to a willing seller under no duress. (R. 50-51) His appraisal totaled $1,935.00. (R. 52)

The basis of Gillette's valuation was his knowledge over the years of the prices similar items brought in the used personal property market. (R. 53)

The valuation can be further broken down as follows:

Children's toys and furniture contained in their rooms: Gillette appraisal, $242.50; insurance proceeds, $3,706.13.

Furniture: Gillette appraisal, $492.00; insurance proceeds, $3,682.40.

Household goods: Gillette appraisal, $533.00; insurance proceeds, $5,339.45.

Minor appliances: Gillette appraisal, $52.50; insurance proceeds, $319.00.

Major appliances: Gillette appraisal, $452.00; insurance proceeds, $3,249.24.

(full itemization appears in the Appendix)

The balance of the appraisal and insurance proceeds are attributable to property acquired after the Paynes' discharge in bankruptcy and to their clothing which has previously been awarded to them and is not a subject of appeal at this time.

Paynes' counsel renewed his Motion to Strike the Testimony of Bruce Solesby at the end of the trial. The Judge said he would take it under advisement. (R. 61)

On January 4, 1983, the Bankruptcy Judge ruled that the debtors were entitled to receive a total of $6,114.29 of the insurance proceeds payable due to their personal property loss.

This figure was arrived at by awarding the Paynes the insurance value of their property acquired post-bankruptcy of $3,664.00; $1,610.29, the insurance value of the personal property specifically itemized in their bankruptcy schedule; and $840.00, the fair market value listed by the Paynes in their bankruptcy schedule rather than the insurance value of the non-specific categories of "furniture", "household dishes and small appliances" and "other personal property".

The balance of the insurance proceeds, $11,275.18, was to be paid to the trustee in bankruptcy for distribution to the creditors of the debtors.

The Paynes appealed the decision of the Bankruptcy Court to the District Court for the Southern District of Illinois, which, on August 14, 1984, affirmed the decision of the Bankruptcy Court.

The decision of the District Court was appealed to the United States Court of Appeals for the Seventh Circuit which reversed the District Court in so far as the District Court had ruled that the insurance proceeds attributable to the Paynes' clothing should not be awarded to them and affirmed the remainder of the District Court's decision. The Paynes' Petition for Rehearing was denied on November 14, 1985.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Including Children's Property And Casualty Insurance Policies As Assets Of A Bankrupt's Estate Are Matters Of First Impression In The United States; Will Affect A Majority Of All Individual Bankruptcies Filed; And Are Contrary To The Public Interest.

A. *Children's Property*

Many, if not most individual bankrupts have minor children who reside in their homes. These children have possessions ranging from the beds they sleep in to their toys and radios. The Paynes' children were no different. The contents of their rooms are listed in the Appendix. The fair market value of these items was $242.50. The insurance proceeds attributable to those items is $3,706.13.

The children are not bankrupt, their parents are. As a practical matter, would any trustee seize these items? The answer must be no. Children may own property and that property right should be respected and the children should not be forced to further suffer their parents' misfortune.

This issue was raised but not specifically ruled upon by the Court of Appeals. The result, however, of the court's failure to rule and the refusal to rehear this case upon this issue results in the insurance proceeds attributable to the children's property being turned over to the trustee for the benefit of the parents' creditors.

Petitioners could find no other case reported dealing with this question. Logic and public policy would, however, seem to militate in favor of restoring the children to the pre-bankruptcy status quo.

B. *Casualty Insurance*

The Court of Appeals' decision has held as a matter of first impression that the Paynes' homeowners' insurance policy was

an asset of the bankruptcy estate to the extent of its "cash surrender value".

This casualty policy, like all other casualty insurance policies, for example, automobile, boat, homeowners or umbrella policies, does not have a "cash surrender value" as that term is commonly defined in the insurance industry. If a policy is cancelled, there may be a return of unearned premium which could then become an asset of the bankrupt's estate.

The Court of Appeals cited several cases in support of its holding. *Patton v. Fidelity-Philidelphia Trust Company*, 246 F. Supp. 1015, 1016 (E.D. Pa., 1965); *In Re Rogers*, 45 F.Supp. 297, 298 (E.D. N.Y., 1942); *In Re Elliott*, 31 B.R. 33 (Bank. S.D. Ohio, 1983); and *In Re Howard*, 6 B.R. 200, 221 (Bank. S.D. Ohio, 1980). None of these cases so hold, nor do any others that petitioners could find.

Each of the cited cases dealt with life, endowment or retirement policies, which do have a cash surrender value. It is submitted to this court that there are significant public policy considerations for differentiating between life, endowment and retirement policies and casualty policies.

Life, endowment and retirement insurance policies are similar to savings accounts. They are optional purchases made by individuals. As time progresses and more premiums are paid they become increasingly more valuable. They are also solely for the benefit of the policy holder or his family. They may be cashed in, borrowed upon, or, finally, drawn upon at maturity for the benefit of the bankrupt or his family's benefit.

Casualty policies, on the other hand, are as much for the benefit of the public as for the policy holder. Homeowners' policies protect those going upon the bankrupt's property as well as the bankrupt himself. Similar protection is afforded to the public by automobile, boat and umbrella policies. Many states require auto insurance as a condition of driving, which

often times is a necessity for continued employment. Also, most lenders, for their own protection, require coverage as a condition of financing an automobile, home, boat, or other property, and will hold the debtor in default if the policy is for any reason cancelled.

The premiums do not build up equity, but are consumed during the policy period in return for the protection afforded the bankrupt and the public or creditors. They protect the status quo rather than altering it as do the former type of insurance policies.

Casualty type policies of insurance should be excluded from the bankrupt's estate so that the bankrupt does not have to make an election to use a part of his exemption to maintain them, or cancel them to the detriment of the public and creditors.

2. **The Decision Below Allows Bankruptcy Courts To Assess Monetary Penalties Against Bankrupts Who Omit Items From Their Schedule Of Assets, Without The Necessity For A Concomitant Finding Of Fraud, Concealment Or Contempt Of Court And Does Not Set Standards For Inclusion Of Assets, Thus Placing All Bankrupts In A Position Of Uncertainty As To The Specificity Required On Such Schedules And Will Lead To Inconsistent Rulings Among The District Courts.**

The bankruptcy court found that the Paynes omitted from their list of assets, several major appliances in their house. Neither the bankruptcy judge nor the district court judge made a finding that the Paynes were guilty of fraud, concealment of assets or contempt of court.

Based upon that finding alone the Court of Appeals has upheld the bankruptcy judge's ruling which allowed the Paynes to receive the insurance proceeds for the few specifically listed items and then only allowed them to keep the market value, rather than the insurance proceeds, for their admittedly proper-

ly, generically listed items on their exemption schedule: *viz.* furniture, household goods and appliances. The Court of Appeals called that "rough justice" (*Payne*, at 208). It is submitted that allowing the Paynes $715.00 from insurance proceeds totaling $7,833.15 for their generic, unsaleable items is a miscarriage of justice and without statutory or other authority and amounts to a penalty where there has been no finding of wrongdoing.

Under the law, the bankruptcy judge may reopen the bankrupt estate if it is found that there have been omissions from the list of assets. 11 USC §350.

Under the law, the bankruptcy judge may deny discharge if he finds that the bankrupt has been guilty of fraud or concealment of assets. 11 USC §727. Concealment and omission are quite different; omission may be innocent.

Under the law, it is also clear that the bankruptcy judge may order omitted items included in the estate upon discovery, since all property owned by the bankrupt at the time of filing the petition is property of the estate. 11 USC §541.

The Paynes have been unable to find any authority for the bankruptcy court to otherwise penalize a bankrupt unless there is a finding of contempt of court under the court's general powers. 11 USC §105.

The Court of Appeals has previously held in *In Re Barker*, 768 F.2d 191, 196 (7th Cir., 1985) that "...personal property exemption statutes should be liberally construed in order to carry out the legislative purpose in enacting them - to protect debtors. (Citations omitted) This clear legislative intent to grant protections to debtors and the court's liberal construction of exemption statutes convince us that in a case such as this one, where an exemption statute might be interpreted either favorably or unfavorably vis-a-vis a debtor, we should interpret the statute in a manner that favors the debtor." This decision is in conflict with that principal.

Here the debtor had a fire at their home, after discharge, which virtually destroyed all of their possessions. The estate was reopened by the trustee when the insurance company told him of insurance proceeds of $17,389.47. It was then found that several major appliances had been omitted from the Paynes' list of assets. The Paynes had replacement value homeowner's insurance.

The Court of Appeals' opinion did agree with the great weight of authority that "[I]t would be silly to require a debtor to itemize every dish and fork..." *Payne,* at 205, and that "[T]he aggregation of 'furniture' and 'dishes' and small appliances' therefore ordinarily would be enough to exempt all items in these categories. *Payne,* at 206.

Here the Paynes listed in their exemption: household goods, furniture and appliances, $1,080.00. These items had the following fair market values according to the Paynes' appraiser: household goods, $533.00; minor appliances, $52.50; furniture $492.00; total $1,077.50. (Defendant's Exhibit "2", see "Appendix" hereto for itemization). The insurance proceeds applicable to these items is as follows: household goods, $5,339.45; minor appliances, $319.00; furniture, $3,682.40; total $9,340.85. There is not a single item in this entire list valued by the Paynes' appraiser at more than $75.00 and most are valued at less than $20.00 per item. The debtors should be given the benefit of the doubt considering the nature of these items, their lack of saleability and the inexact nature of an appraisal. It surely cannot be seriously contended that these items would have been seized prior to discharge and before the fire. The trustee simply would not have done so. It is respectfully submitted that the courts and the trustee have been blinded in their reasonable analysis of this situation by the cash from the insurance proceeds. The Paynes properly listed these items under generic title and are entitled to the fire insurance proceeds. *In Re Snow,* 21 B.R. 598, 601 (E.D. Cal., 1982). In *Snow,* the court allowed the debtors to retain full insurance

replacement value of $19,834.00 on items originally listed on their bankruptcy schedule at $1,500.00 after a fire destroyed their house.

The cases cited by the Court of Appeals in support of its position are, in fact, either supportive of the Paynes' position, or, are not supportive of the Court of Appeal's position. *In Re Friedrich*, 100 F. 284, 285 (7th Cir., 1900) deals with an involuntary business petition which was subject to considerably different rules at the time of its decision and, as it refers to voluntary petitions in *dicta*, does not require the specificity required by the Court of Appeals nor provide any authority for the penalty exacted. Neither do *Stewart v. Ganey*, 116 F. 2d 1010 (5th Cir., 1940); *In Re Settle*, 14 B.R. 31 (D.N.H., 1981); *In Re Elliott*, 31 B.R. 33 (S.D. Ohio, 1983) nor *In Re Dorricutt*, 5 B.R. 192 (N.D. Ohio, 1980) provide any such support for penalties as assessed by the bankruptcy court. They are, at best, authority for including omitted assets in the estate. As they apply to fraud or concealment, they are inapplicable as there were no such findings here.

The Court of Appeals has correctly recognized the long-standing position of the courts that "[T]hese forms were not designed to effect any change under the law. They are 'forms', and nothing more..." and that the law does not require minute itemization. *Burke v. Guarantee Title and Trust Company*, 134 F. 562, 563-564 (3d Cir., 1905). Finally, after recognizing previous authority, the Court of Appeals chose to ignore it, and since a few items were omitted by the debtors, decided that they should not receive the insurance proceeds for any of the items beyond those which were specifically itemized. This is contrary to the holding in *Stewart v. Ganey*, 116 F. 2d 1010, 1011-1012 (5th Cir., 1940) where the court, after a finding of concealment, still allowed the debtor to select his exemptions from the concealed property, holding that if there is no fraud, no restriction may be imposed upon the debtor's right to select his exemptions.

To allow such an opinion to stand will leave future bankrupts without guidance as to the degree of specificity required in their schedules of assets. They must list every single item they possess or risk that the bankruptcy judge before whom they appear might order all other assets or the proceeds therefrom seized for the benefit of creditors.

It will further lead to conflicting decisions from district to district and even within districts, since the Court of Appeals provided no standards or other guidance to the lower courts for the application of this rule.

Finally, listing every possession is burdensome upon the bankrupt and the courts with no concomitant benefit to the bankruptcy system.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

In Bankruptcy No. BK 81-40190

Adversary No. 82-0086

In Re:

Jerry Payne and Deborah Payne,
Debtors.

Charles R. Wood, Jr., Trustee,
Plaintiff,

vs.

Jerry Payne, Deborah Payne and Country Mutual
Insurance Company,
Defendants.

ORDER

(Filed January 4, 1983)

At East St. Louis, in said District, this matter having come before the Court pursuant to notice on a complaint filed by Charles R. Wood, Jr., Trustee of the estate of the above named debtors by Joel Kunin, his attorney, an answer and affirmative defense having been filed by the above named debtors by George Riplinger, their attorney, a motion to intervene having been filed by the Ina State Bank by Terry Sharp, its attorney, the matter having come on for trial and the Trustee having appeared by his attorney and the debtors having appeared in person and by their attorney, and the Court, having heard the testimony of the witnesses and having reviewed the exhibits and having researched the law and otherwise being fully advised in the matter, finds as follows:

1. On August 12, 1981, the above named debtors filed a voluntary petition in Chapter 7 Bankruptcy;

2. On Schedule B-2 of the debtors' bankruptcy schedules, the debtors listed the following personal property:

Zenith Stereo	8 years old	$ 50.00
G. E. Refrigerator	9 years old	25.00
G. E. Washer	8 years old	15.00
G. E. Dryer	8 years old	25.00
Furniture		615.00
Household Dishes and Small Appliances		100.00
RCA Color Television		250.00
Other Personal Property		125.00
Ford 12 Horsepower Riding Mower		1,000.00

3. On Schedule B-4, the debtors claimed as exempt their clothing, household goods and furnishings and appliances in the total amount of $1,205.00.

4. On or about December 15, 1981, there was a fire at the debtors' home which destroyed all or virtually all of the debtors' personal property;

5. The debtors had homeowners insurance with the Country Mutual Insurance Company;

6. The insurance policy called for payment of replacement cost of the destroyed goods;

7. The debtors then filed a claim with the insurance company listing a very extensive and detailed list of personal property which was destroyed or damaged in the fire.

8. Pursuant to the insurance policy and the debtors' claim the Country Mutual Insurance Company paid the debtors $5,000.00, and stands ready to pay an additional $12,389.47 for damage done by the fire to the debtors' personal property;

9. Some of the property destroyed in the fire was obtained by the debtors after the filing of the petition in bankruptcy;

10. The amount of the property destroyed in the fire that was acquired post-bankruptcy as alleged in the debtors' answer, was $3,664.00.

The principal question facing the Court in this case is whether the debtors or the Trustee in Bankruptcy is entitled to certain insurance proceeds payable as a result of a fire at the debtors residence. The facts and law applicable to this case make it clear that the debtor should retain $6,114.29 of the insurance proceeds, with the balance of the funds to be turned over to the Trustee in Bankruptcy for distribution to the estate of the debtors.

The first consideration facing the Court in this matter is that some of the property destroyed in the fire was acquired by the debtors after the filing of the petition in bankruptcy. The debtors' answer claims that the property acquired post-bankruptcy that was destroyed in the fire had a value of $3,664.00. This evidence of value of after-acquired property was not contradicted at trial. It is clear that this after-acquired property is not property of the estate, and as such the Trustee does not have any claim to the insurance proceeds in this amount;

The balance of the insurance proceeds post more significant problems. The Bankruptcy Court for the Middle District of Pennsylvania was faced with almost identical facts in the case of *In Re Lewis,* 6 CBC2d 1142 (B.C., M.D. Pa. 1982). In the *Lewis* case, the Court held that the debtors were only entitled to insurance proceeds in the amount of the property disclosed to the Court on their schedules and properly claimed as exempt. This Court feels that the logic and holding of *Lewis* is proper and should be applied to this case.

The Court in *Lewis* held that if the debtors do not fully disclose the nature and extent of their personal property on their schedules in bankruptcy, the Court may, by exercise of its equitable powers, limit the share of proceeds to be paid to the

debtors to an amount actually disclosed to the Court on the schedules. This is an appropriate and equitable approach to take. Otherwise, a debtor may be able to profit by his failure to specifically list his assets on the schedules in bankruptcy.

The only difference between this case and *Lewis* is that in this case the debtors had a replacement value policy, while in *Lewis* that did not appear. As such, an adjustment should be made to reflect the value received by the debtor for the property actually listed. The amounts the debtors received for the items specifically listed is as follows:

Zenith Stereo	$ 206.10
Washer	224.37
Dryer	155.62
Refrigerator	665.00
Color T.V.	359.20
	$1,610.29

The debtors should be allowed the insurance proceeds actually received for the items specifically listed. In addition, the debtors should be allowed the value claimed on their bankruptcy schedules for the items not specifically listed. These items are as follows:

Furniture	$615.00
Household Dishes and small appliances	100.00
Other personal property	125.00
	$840.00

This means the debtors are entitled to insurance proceeds in the amount of $6,114.29. This amount is the value of the property acquired after the filing of the petition in bankruptcy, plus the amount of insurance proceeds for items specifically listed on the schedules in bankruptcy, plus the amount of the general

property claimed on the debtors' schedules. The balance of any funds should be turned over to the Trustee in Bankruptcy.

The debtors have already received $5,000.00 in this case. As such, they are entitled to $1,114.29 of the funds held by the insurance company, and the rest of the funds should be paid to the Trustee in Bankruptcy.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the debtors are entitled to insurance proceeds in the amount of $6,114.29 for the loss of their personal property, with the balance of the funds payable because of loss of personal property to be turned over to the Trustee in Bankruptcy;

IT IS FURTHER ORDERED that since the debtors have already received $5,000.00 in settlement of the loss of their personal property, the Country Mutual Insurance Company should pay them $1,114.29, with the balance of the funds for the settlement of personal property to be turned over to the Trustee in Bankruptcy.

U. S. BANKRUPTCY JUDGE

ENTERED: January 4, 1983

The second ground for error claimed was the finding of the Bankruptcy Court that the debtors failed to fully itemize their personal property. There was evidence on the record from which Judge Trabue could conclude that the debtors failed to disclose certain assets on their bankruptcy schedule. The Court does not consider Judge Trabue's finding in this regard to be clearly erroneous. The Bankruptcy Court's decision to limit the insurance proceeds paid to the debtors based on what they disclosed on their schedules and what the Court found to be property acquired after the filing of bankruptcy was within the bankruptcy judge's equitable discretion. This Court does not find any reason to second guess Judge Trabue's determination which undoubtedly took into consideration, among other things, the credibility of those who testified at trial.

Accordingly, the decision of the Bankruptcy Court is hereby AFFIRMED.

IT IS SO ORDERED.

DATED: August 14, 1984

/s/ James L. Foreman
Chief Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2565

Jerry Payne and Deborah Payne,
Debtors-Appellants,

v.

Charles R. Wood, Jr.,
Plaintiff-Appellee.

Appeal from the United States District Court for the
Southern District of Illinois, Benton Division.
No. 83-C-4042—**James L. Foreman**, *Chief Judge.*

Argued October 1, 1985—Decided October 18, 1985

Before Cudahy and Easterbrook, *Circuit Judges,* and Pell, *Senior Circuit Judge.*

Easterbrook, *Circuit Judge.* In 1981 Jerry and Deborah Payne made two lists of their household possessions. The first list recited that they owned a 9-year-old refrigerator worth $25, and 8-year-old stereo worth $50, furniture worth $615, household dishes and small appliances worth $100, clothing worth $125, a color television set worth $250, no books, no firearms or sports equipment, and no insurance. The aggregate value of personal property on this list was $1,205, including the clothing. The second list recited that they had two year-old

stereo systems and some additional speakers, a 3-year-old refrigerator, three TV sets, a 2-year-old air conditioner, a 3-year-old encyclopedia, a pistol, a bow, and quite a bit more. The Paynes filed the first list with a bankruptcy court in August 1981. They presented the second list to the Country Mutual Insurance Co. in December 1981, after their house burned down. Country Mutual sent an investigator and decided that the property was worth $17,389.47. The Paynes want the money. So does the bankruptcy trustee.

The bankruptcy court first apportioned to the Paynes the $3,664 in proceeds attributable to property they acquired after their discharge in bankruptcy. Further steps were complicated by the nature of the insurance policy, which compensated the Paynes for the original cost of the property less depreciation, rather than for the price for which the used property could have been sold. The Paynes' policy also allowed them to replace destroyed items within six months, in which case Country Mutual would pay the full replacement cost.

The bankruptcy judge divided the Paynes' property into three classes. Proceeds from items that had been listed (for example, one color TV set) would go to the Paynes. Proceeds from durable goods that had not been listed (for example, the air conditioner) would go to the trustee. Proceeds from goods that had been listed by category (the furniture, dishes, and clothing) would go to the Paynes in the amount they had listed as the value of these goods, then to the trustee to the extent Country Mutual paid more. The Paynes thus received $665 for the refrigerator, $359.20 for one color TV, $125 for clothing, $615 for furniture, and so on. The total was $6,114.29 to the Paynes, the balance to the trustee. The district court affirmed. Only the Paynes appeal.

Under the Bankruptcy Act all property of the debtor becomes part of the estate available to satisfy the creditors' claims. 11 U.S.C. §541(a). The debtor then may remove some of the pro-

perty by claiming exemptions under 11 U.S.C. §522(b). Anything properly exempted passes through bankruptcy; the rest goes to the creditors. The debtor must file "a list of property that the debtor claims as exempt", and "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. §522(1). If the debtor does not claim an exemption with respect to particular property, the rule of inclusion stated in §541 controls, and the property goes to the creditors. *In re Friedrich,* 100 F. 284 (7th Cir. 1900); *Gardner v. Johnson,* 195 F.2d 717 (9th Cir. 1952); *In re Guerrero,* 30 B.R. 463 (N.D. Ind. 1983); *In re Elliott,* 31 B.R. 33 (Bankr. S.D. Ohio 1983).[1] Once property enters the estate, it does not matter whether the property changes form. 11 U.S.C. §541(a)(6); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977). If the debtor sells a piece of the creditors' property, he must turn over the proceeds; here, to the extent the contents of the house belonged to the creditors, they get the proceeds.

Our initial inquiry therefore is: What did the Paynes' list remove from the estate? Illinois has exercised its right under §522(b)(1) to establish the nature and maximum amount of exemptions. The rule in force today permits a debtor to keep "necessary wearing apparel, bible, school books, and family pictures" without regard to value, plus the "debtor's equity interest, not to exceed $2,000 in value, in any other property." Ill. Rev. Stat. ch. 110 §§12-1001(a) and (b). Illinois law also allows exemptions concerning vehicles and homes, see *In re Barker,* 768 F.2d 191, 194-95 (7th Cir. 1985), that are not pertinent here. The Paynes claimed their exemption for clothing and $1,080 worth of other property, most lumped under the headings "furniture" ($615) and "household dishes and small appliances"

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[1] *Friedrich* and *Gardner* interpret the 1898 act rather than the current version, but the mechanics of exemption, as opposed to the substance of what may be exempted, were not changed in the 1978 revisions.

($100). A close reading shows that they were not claiming anything else except a new color TV and four appliances 8-9 years old: a washer, a dryer, a refrigerator, and a stereo system.[2] Because the list did not include any other appliances, books, sports equipment, and the like, all this became part of the estate.

With respect to the property in the estate, the difference between market value insurance and replacement value insurance is a distraction. The fire turned physical assets of the estate into insurance proceeds; the trustee gets whatever these proceeds happen to be. Similarly, the Paynes get whatever the proceeds happen to be for the property that was exempted. The Paynes argue that they should be entitled to the proceeds on all property that could have been put within the limit in Illinois, but this is not so.[3] The partition between debtors and estate depends on

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[2] Bankruptcy schedule B-2 requires debtors to list all their personal property. The Paynes itemized five large appliances and $100 for "dishes and small appliances;" the residual claim is for "furniture," so the list claims no other large appliance. One line item on schedule B-2 calls for the value of "wearing apparel, jewelry, firearms, sports equipment, and other personal possessions." The Paynes wrote "125.00" on this line. On another schedule they claimed that their clothing was exempt and worth $125. This means that they were claiming that they owned no "jewelry, firearms, sports equipment, and other personal possessions". Another line item calls for "interests in insurance policies (itemize surrender or refund values of each)"; the Paynes wrote "0.00" here. Still another item requires the value of "books, pictures, and other art objects, stamp, coin, and other collections." The Paynes wrote "0.00" on this line too. Because the Paynes denied that they had any books, we need not consider whether the encyclopedia could have been exempted as "school books" under the Illinois statute.

[3] The parties assume that the limit in Illinois is $2,000. But until the end of 1981 the limit was only $1,000. See Ill. REv. Stat. ch. 52 §13-1(b) (1981). This may explain why the Paynes filed a list claiming only $1,080 in exempt property even though, they now tell us, they could have put more within the $2,000 allotment. We need not pursue the point.

what was actually exempted, not what could have been exempted.[4]

The Paynes have not tried to amend their list of exemptions, and although amendments before discharge are liberally allowed it is most unlikely that the Paynes would be permitted to amend. The Paynes' omissions from the initial list suggest that they meant to hide assets if they could get away with it; Jerry Payne testified that he omitted the encyclopedia, for example, because "[i]f they come in on it later you have to release it." The operation of the bankruptcy system depends on honest reporting. If debtors could omit assets at will, with the only penalty that they had to file an amended claim once caught, cheating would be altogether too attractive. The omission of assets may be a good reason to deny or revoke a discharge. 11 U.S.C. §727; Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393, 1440-46 (1985). When it is hard to detect an effort to evade the law, the penalty must exceed the profits of the evasion. So, here, it is too late for the Paynes to start over and ask the court to apportion the proceeds as if they

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[4] This makes it unnecessary for us to decide whether there is a difference between "market value," to which the Paynes' expert testified, and "original price less depreciation," to which the trustee's expert testified. The Paynes argue that market value is the price that could have been realized at a distress sale, and that this is the Illinois measure of value. This dispute would be pertinent only if the bankruptcy court needed to determine just how much property could have been squeezed into the limit, but it did not need to do this even on the parties' assumption (see note 3, *supra*) that the limit was $2,000. Cf. Alan Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & Econ. 117, 124-39 (1983) (discussing whether creditors maximize the price of assets on which they realize).

had filed a complete schedule in the first instance.[5] See *Stewart v. Ganey*, 116 F.2d 1010 (5th Cir. 1940); *In re Elliott, supra; In re Settle*, 14 B.R. 31 (Bankr. D.N.H. 1981); *In re Dorricott*, 5 B.R. 192 (Bankr. N.D. Ohio 1980).

Although the trustee receives the full proceeds for property that was not claimed as exempt—and which therefore never left the estate—the question remains just what *was* claimed as exempt. The claim of "clothing" worth $125 exempts all of the Paynes' clothing. Illinois law allows the exemption of "necessary wearing apparel" without regard to value. The trustee does not say that any of the Paynes' clothing is not "necessary," cf. *In re Deacon*, 27 F. Supp. 296 (S.D. Ill. 1934), so no clothing is left in the estate. The bankruptcy court nonetheless gave the Paynes only $125 in proceeds for clothing, leaving the rest for the estate. It should have given the Paynes the full proceeds for their clothing, for the same reason it gave the trustee the full proceeds for the air conditioner. The proceeds go to the owner of the property.

The treatment of "furniture" and "dishes and small appliances" is more difficult. A debtor may not exempt all property in these categories; these count against the limit, so a general listing of "furniture" does not necessarily keep all furniture out of the estate. The treatment of these claims depends in part on how specific a claim of exemption must be.

It would be silly to require a debtor to itemize every dish and fork, even to list the electric knife separately from the crock

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[5] *Lewis v. Thompson*, 28 B.R. 351, *modified*, 30 B.R. 741 (Bankr. M.D. Pa. 1983), on which both parties and the bankruptcy court relied, involved an initial list of exemptions hastily filed and quickly amended; the court accepted the amendments. This did not happen here. Cf. *In re Snow*, 21 B.R. 598, 601 (Bankr. E.D. Cal. 1982) (if property is listed on the claim of exemption, the debtor gets its full insured value even if that value exceeds the market price on the schedule).

pot. The necessary degree of specificity varies with the value of separate listings. The lower the value of the items, the less reason to identify each. But it does not follow that a generic listing always encompasses the low-value items within a category. The requirement that the debtor list the property serves at least two functions. One is to settle claims of title, so that on the day of discharge everyone knows who owns what. The other is to allow the trustee to decide which claims to chailenge. Debtors are not perfectly trustworthy, and unless the claim of exemption contains sufficient detail to put the trustee on notice of questionable assertions, it will not be possible to administer the statutory scheme. Cf. *In re Friedrich, supra,* 100 F. at 286 ("much abuse of the beneficent law allowing exemptions might arise if, with respect to a general stock of goods, the debtor should be permitted to place upon selected articles his own estimate of value").

A court may not let the debtor be the sole estimator of market value, which would be the outcome of unrestrained categorical assertions of exemption. At the same time, a court may not announce a specific rule such as: "List separately each item that a trustee might think could be sold for $25 or more." When writing the bankruptcy code Congress had to choose between a specific set of rules, such as a $25 line of demarcation, and a more general standard. The code selects a standard rather than a rule, and a court may not reverse this choice just because the rule seems more easily administrable. The degree of specificity must be left in the charge of those who draft the bankruptcy schedules, and so far they have allowed many items to be lumped together for a single valuation. Cf. *Burke v. Guarantee Title & Trust Co.,* 134 F. 562 (3d Cir. 1905) (it is not necessary to itemize exempted property separately from the bankruptcy schedule).

The aggregation of "furniture" and "dishes and small appliances" therefore ordinarily would be enough to exempt all items in these categories. Yet ordinarily is not always. The deb-

tor must furnish enough information to put the trustee on notice of the wisdom of further inquiry. The trustee, who protects the interests of the creditors, then may make a calculation of the benefits of more detailed listing in each case, and he may ask the bankruptcy court to require the debtor to do more. If a bankruptcy schedule should list $10,000 in new appliances and only $615 in furniture, the trustee might be startled by the imbalance and make further inquiry. When the schedule shows only elderly appliances of minimal value, a small claim for furniture, dishes, and small appliances does not invite inquiry. When the debtor's listing withholds information that the trustee may find helpful in deciding to make such a request, a categorical claim of exemption should not be honored beyond the value the debtor attached to the category. After all, property passes to the estate automatically, and it is the debtor's burden to make out the claim of exemption with adequate specificity.

The Paynes' list did not put the trustee on notice. The schedule contained only old appliances and one new TV; nothing would have caught the trustee's eye. A more accurate listing might have provoked investigation. The Paynes concede that even by their methods of valuation an accurate schedule would have revealed more than $2,000 of assets and that the trustee might well have found it worthwhile to take and sell several items (see also note 3, *supra*). By filing an incomplete form, the Paynes forestalled an inquiry they knew lay in store. The legal result is a limitation on the value they may receive for assets in these categories.

Rough justice, no doubt. Even if all of the Paynes' furniture, dishes, and small appliances were worth no more than $715 in August 1981, their insurance policy would have paid more. But any other principle would encourage the making of excessively general claims in the hope that if omissions should be discovered, the debtors could argue that the omitted property

was "really" in some broadly worded category. The roughness of this justice does not always hurt debtors, either. The omissions from their schedule of assets might have been grounds to set aside the discharge; the trustee settled for a lesser remedy. The bankruptcy court might have concluded that the large appliances had been misdescribed (all were newer than the schedule asserted) and reduced the payments on that account. And the bankruptcy court might have decided that the policy *itself* is an asset of the estate, which would have directed all of the proceeds to the trustee. The policy was property of the debtors, but they did not list it among the items for which they claimed exemption. If the property was insured in December 1981 because of a premium paid before August 1981, the trustee might have claimed the policy.[6] Other cases have held that the failure to list a policy of insurance means that the trustee gets the proceeds. *Patton v. Fidelity-Philadelphia Trust Co.*, 246 F. Supp. 1015, 1018-20 (E.D. Pa. 1965); *In re Rogers* 45 F. Supp. 297 (E.D.N.Y. 1942); *In re Elliott, supra; In re Howard,* 6 B.R. 220 (Bankr. S.D. Ohio 1980).

No bankrupt will itemize every possession; none should. Every bankrupt must do enough itemizing to enable the trustee to determine whether to investigate further; the Paynes did not. It was not possible in this case—it will not be possible in any other—to determine with assurance which items passed through bankruptcy as exempt. Because there must be imprecision in any case of this sort, we do not disturb the bankruptcy judge's decision to limit the recovery to $715 for furniture, dishes, and small appliances. We remand this case with instructions to determine how much of the insurance proceeds is attributable to clothing and to award that to the Paynes. The judgment is affirmed in all other respects. Costs to appellee.

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[6] The cash surrender value of the policy was an asset of the estate. In order to keep the policy, the Paynes should have charged the surrender value against their maximum exclusion.

Cudahy, *Circuit Judge,* dissenting in part. I agree that honest reporting is very important for the successful operation of the bankruptcy system. But the majority seems to have lost sight of the fact that the purpose of insurance is to permit replacement of the articles destroyed. Had there been no fire, the bankrupts would in all probability have been able to continue housekeeping with their existing furniture, dishes and small appliances. Now they must somehow replace these items for $715 or eat with their fingers off the floor.

I cannot accept the speculation of the majority that a more accurate listing of major appliances would have led the trustee to doubt the value placed on furniture, dishes and small appliances. It is not fair to engage in guesswork which simply results in a windfall to the creditors because the small household goods burned up in a fire. The bankrupts, not the creditors, had the foresight to get the insurance and to pay the premiums. Since there is no plausible theory under which the debtors are not entitled to the furniture, dishes and small appliances, they are entitled to the funds to replace those essential household items.[1] They are certainly entitled to this much of a "fresh start." I therefore respectfully dissent as to the matters discussed.[2]

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[1] In fact, the majority concedes that, "the Paynes get whatever the proceeds happen to be for the property that was exempted." Slip op. at 4.

[2] In addition, under Rule 1009 of the Federal Rules of Bankruptcy Procedure a debtor may amend any schedule "as a matter of course at any time before the case is closed," including lists of exempt property. *Lucius v. McLemore,* 741 F.2d 125, 127 (6th Cir. 1984) (per curiam). Of course, the debtor must make a request to invoke Rule 1009. Such an amendment would, in my view, meet the majority's concern as to what items are attributable to the categorical listing of furniture, dishes and small appliances, as well as its query about those other items that property could be claimed as exempt (*e.g.,* the encyclopedia). The debtors may well be entitled to additional proceeds under this approach.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 14, 1985

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Wilbur F. Pell, Jr., Senior Circuit Judge

Jerry Payne and Deborah Payne,
Debtors-Appellants,

vs.

No. 84-2565

Charles R. Wood, Jr.,
Plaintiff-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois,
Benton Division.
No. 83-C-4042
James L. Foreman, *Chief Judge*

ORDER

Debtors-appellants filed a petition for rehearing and suggestion of rehearing en banc on November 1, 1985. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and a majority of the judges on the panel have voted to deny rehearing.* The petition for rehearing is therefore DENIED.

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* Circuit Judge Cudahy voted to grant the petition for rehearing.

APPENDIX E

List of Debtors' Assets

CHILDREN'S POSSESSIONS

Bunk Beds (2)
Mattress (2) Posturepedic
Springs
Twin Size Sheet Set
Blankets
Books
Bedspread
Pillows
Stuffed Animals
Sheets
Floor Pillow
Bookcase (Sears)
Children's Bible Story Book Set
2 pc. Children's Dictionary & Encyclopedia
Bookcase nic-nacs
Desk Accessories
Frog Door Stopper
Wood Stereo Stand
8 track AM-FM radio
Records
Wall Placques
Roller Skates
Alarm Clock (Big Ben)
Sleeping Bags
Toys

Waste can
Encyclopedia Americana
Little Professor and Little Genius Calculator
Plastic Models
Guitar

Record Case
8 Track Case

Flashlight
Baseball Bat
Baseball Glove
Nylon Pup Tent
Story Teller Set

Chair
Bookend Sets (Ships)
Rolltop Desk
Desk Light
Wicker Clothes Hamper
Stereo & 2 Speakers (Zenith)
Turn Table
Wooden Toy Chest
Metal Shelf Unit
Strobe Light
Ceramic Horse and Eagle
Tumbling Exercise Mat
Games, Checkers, Dominos etc.
Boys Jewelry Box

FURNITURE

Lighted Table
Encyclopedia Stand
Book Case Slotted (K-Mart Brand)
Fiberglass Electric Fireplace
Coffee Table
Couch
China Cabinet
Dining Room Chairs
Rattan Swinging Chair (hanging)
Mattress and Springs
Dresser (Triple Drawers)
Dresser
Chest (Cedar Lined)
Typewriter Table
Metal Shelf Unit
Book Case (Broyhill)
Chair to Typewriter Desk
End Table
Chair (Swivel)
Curio Stand
Wood Curio Cabinet
Brass Bed (Queen Size)
Chair
Wooden Lamp
Marble Bedside Tables (2)
Wooden Storage Cabinet

APPLIANCES

Electric Griddle
Blender
Blow Dryer
Electric Curling Iron
Electric Heater
Facial Sauna
Decor Telephone (Sears)
Gas Grill
Corn Popper
Hair Dryer
Electric Curlers (G.E.)
Electric Curling Brush
Lather Machine
Radio
Toaster
Iron

MAJOR APPLIANCES

Penny's Color TV
GE Washer (heavy duty)
AC-DC Black & White TV
Refrigerator
Amber Wood Burning Stove
Movie Projector & Camera
Cassette Player
AM-FM Radio Cassette (Zenith)
GE Dryer (3 cycle)
Floor Model Stereo
Air Conditioner
Speakers
Pistol H & R Standard
Stalker Bow

HOUSEHOLD GOODS

Drapes
Gun Case
Drapes (Sliding Door)
Swag Lamps
Bowie Knife
Cook Books
Roll-A-Matic Sponge Mop
Cleaning Materials
Ironing Board
Garbage Can
Clothes Pin Bag & Pins
Kirby Accessory Parts
Key Rack
Wood Magazine Rack
Scenery Pictures
Lighted Sunset Picture
Sheers
Small Wood Lamps
Crystal Candy Dish
Wood Stove Accessories
Coal Bucket
Ceramic Nic Nacs
Ornaments, Garland, Lights
Basket & Dried Flowers
Smoke Detector
Mugs
Duhasa Dinnerware (Service of 4)
Silverware (Service of 4)
Wood Salt & Pepper Shakers
Wine Table & Wine Rack
4 Bottles of Wine
Crystal Bell
Ceramic Vase
Smoke Detector
Small Decorator Mirror
Drapes (Back Door)
Bookends
Lantern
Dust Mop & Broom & Dust Pan
Laundry Materials
Clothes Baskets
Curtains
Canned Goods
Plastic Clothes Hamper
Leather Lead Halter
Wood Plant Stand
Plaques Spaniards
Wood Shelf Mantel
Drapes
Curtain to Door
Digital Clock
Throw Rug
Bellow
Afghan
Mountain Christmas Tree
Tree Stand
Wooden Vase
Barometer, Temperature Humidity Set
Duhasa Glasses
Red Glass
Crystal Glasses
Silk Flower Arrangement
Wine Decanter & 4 Glasses
Kerosene Oil Lamp
Crystal Bowl
Princess House Bowl

Sea Shell Wind Chimes
3 Pairs Priscilla Curtains
Black Glass Honey Dish
Napkin Holders (Wood)
Elephant Decanter
Soup Bowl with Ladel
Coach Lamps
Wall Plaques
Placement Setting
Tray
Basket Weave Plate Holder
Towel Set
Wicker Wall Shelf
Flower Arrangements
Bath Shag Rugs
First Aid Items
Bath Towels
Wash Cloths
Sheets (Twin)
Blankets
Macrame Holder
Pillows
Full Length Mirror
Cleaning Material
Wicker Toothbrush Holder
Clean Machine
Window
Vanity Bench
Bedspread (Master BR)
Drapes (Master BR)
Quilt (Master BR)
Sewing Basket
Wall Arrangement
Picture
Clock
Eye Glasses
Red Hanging Lamp
Black Glass Urn
Tablecloth
Throw Rug
Marble Candle Holders
Candy Dish
Pictures
Steak Knives
Cloth Napkins
Nut Cracker Set
Pecan Butcher Block
Kleenex Holder
Ceramic Dish
Shower Curtain
Toiletries
Scale
Hand Towels
Metal Shelf Unit
Sheets (Queen)
Hair Curlers
Pictures and Plaques
Pea Shell Ornament
Toilet Plunger
Marble Soap Dish
Tank Covers
House Window
Rattan Cosmetic Tray
Pillows (Master BR)
Blanket (Master BR)
Sheets (Master BR)
Sheets-Queen Size
Silk Flower Arrangement
Nic-Nacs
Wash Basin Stand
Pitcher & Bowl Basin
Pyrex Bowl Set

Salad Bowl
Spices
Tupperware Serving Bowls
Glassware
Custard Bowls
Food
Hot Plate pad
Tupperware Mixing Bowls
Tupperware Meat Marinator
Tupperware Storage Container
Tupperware Vegetable Crisper
Tupperware Parfait Cups
Tupperware Large Storage Container
Metal Coaster
Vegetable Slicer
Cooking Utensils
Knives
Steak Knives
Cake Cooling Racks
Iron Skillets lg & sm
Grater
13 X 9 Cake Pan
Loaf Pan
Wilton Square Cake Pan
Cookware
Crock Pot
Curtains
Salt & Pepper Shakers
Spoon Arrangement
Bread Box (Wood)
Grape Arrangement
Candy Dish
Papertowel Holder
Tupperware Cereal Keeper
Dinnerware for 4
Pitchers
Soup Bowls w/ Handles
Pot Holders
Silverware Tray
Tupperware Egg Tray
Tupperware Bun Storer
Tupperware Lunchmeat Keeper
Tupperware Ice Cream Keeper
Tupperware Cracker Keeper
Tupperware Medium Storage Container

Baking Dish Corningware
Baking Cups & Spoons
Cutlery Set
Foil, Saran Wrap etc.
Glass Serving Tray
Flour Sifter
Strainer
Pie Pan
Wilton Doll Pan
Oblong Cake Pan
Corningware Cooking Pans
Throw Rug
Wood Napkin Holder
Mushroom Spoon & Fork
Telephone Stand
Bird House, (Wall Plaque)
Fondue
Cookie Canister
Bin on Wheels

Dish Rack & Drainboard
Porch Swing (Oak)
Wooden Planter Box
Kitchen Table Unit
Hanging Pots & Macrame

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JERRY PAYNE AND DEBORAH PAYNE,
Petitioners,

vs.

CHARLES R. WOOD,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEROME J. SCHLICHTER
CHARLENE E. NOVICK
CARR, KOREIN, KUNIN, SCHLICHTER
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QUESTION PRESENTED FOR REVIEW

Was the United States Court of Appeals for the Seventh Circuit correct in holding that insurance proceeds on personal property which was not scheduled and therefore *not* claimed exempt under 11 U.S.C. § 522 are properly included as *part of the bankrupt's estate* under 11 U.S.C. § 541, where the debtor received the State statutory limit on exempt property and where the debtor failed to amend his Schedule of exemptions to include reference to such items, even though he knew the Schedule was grossly inaccurate?

LIST OF PARTIES

The parties to the proceeding whose judgment is sought to be reviewed are:

Plaintiff - Charles R. Wood, Jr., Trustee

Defendant - Jerry Payne
Deborah Payne

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No. 85-1298

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JERRY PAYNE AND DEBORAH PAYNE,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

The Paynes' brief falls short of reciting all of the pertinent facts. Accordingly, Respondent submits the following supplemental statement of facts.

On August 12, 1981, the Paynes filed a voluntary petition under chapter 7 of the Bankruptcy Code. (Order, Jan. 4, 1983). In late 1981, the Paynes made two lists of their household possessions. They submitted the first list to the Bankruptcy Court, listing their personal property exemptions for their B-2 bankruptcy schedules:

Zenith Stereo	8 years old	$ 50.00
G. E. Refrigerator	9 years old	25.00
G. E. Washer	8 years old	15.00
G. E. Dryer	8 years old	25.00
Furniture		615.00
Household Dishes and Small Appliances		100.00
RCA Color Television		250.00
Other Personal Property		125.00
Ford 12 Horsepower Riding Mower		1,000.00

(Order, Jan. 4, 1983, Pet. Br. at A-2). They claimed a total exemption of $1,205.00 for clothing, household goods, furnishings and appliances on their Schedule B-4 (*Id.*).

On December 15, 1981, a fire destroyed the debtors' home and much of their personal property. (*Id.*). After the fire, the debtors made their second list of their personal property. They filed the second list, an extensive and detailed list of property with their fire insurance loss carrier (*Id.*). The insurance list included the following, among other items:

Zenith Stereo	1 year old	206.10
G. E. Refrigerator	3 years old	665.00
G. E. Washer	3 years old	224.37
G. E. Dryer	3 years old	155.62

(Trustee's Exh. B)

The Paynes fail to account for the clear discrepancies between the values and relative ages of appliances as indicated on their B-2 Schedules and as indicated on their insurance proof of loss forms. The Seventh Circuit found: "The Paynes' omissions from the initial list suggest that they meant to hide assets if they could get away with it." *Payne,* Slip. op. (Pet. Br. at A-13).

The Paynes also fail to refer to the following items of personal property which, among others, appeared on the insurance list but were not listed on the bankruptcy schedules at all:

Item	When Acquired	Ref. Found
Penney's color television set	1980	(Trustee's Exh. B)
Zenith radio cassette player	1978	(Trustee's Exh. B)
Black and white television set	1978	(R.7)
Air conditioner	1979	(Trustee's Exh. B)
Gas grill	1979	(Trustee's Exh. B)
Floor stereo	1979	(R.8)
Stereo speakers	1979	(Trustee's Exh. B)
Encyclopedia Americana	1978	(Trustee's Exh. B)
H&R pistol	owned a couple of years	(R.11)
Stalker bow	1980	(Trustee's Exh. B)
Movie projector and camera	1981	(Trustee's Exh. B)

The Paynes admit they "did not list several items which may have been reasonably saleable by the Trustee." *Payne*, Slip. op. (Pet. Br. at A-16). They also stated that the insurance list is a true and accurate description of the personal property destroyed by fire on December 15, 1981. (Trial R.11, line 14). They cite no evidence to explain the discrepancies between the insurance list and the bankruptcy schedules. Nor have they ever explained or sought to excuse their failure to amend their bankruptcy schedules.

At the hearing before the Bankruptcy Court, Mr. Payne gave inconsistent testimony or no testimony at all in explanation of the discrepancies between the two forms. Regarding the movie equipment, he stated: (1) it was purchased *prior* to the bankruptcy (R.6, line 25); (2) it was purchased *after* the bankruptcy (R.41, line 18); and (3) it was purchased *to replace* what he knew would be taken in bankruptcy (R.42). He "didn't know why" the black and white television set was not reported

on the bankruptcy schedule. (R.47, line 5; compare Trustee Exh. B, p. 24). He didn't recall whether there were two stereos (R.47, line 15); only one stereo was listed on the bankruptcy schedule (B-2), while two were listed for fire insurance recovery purposes. (Trustee's Exhibit B, p. 9; p. 24). When asked why he did not report his set of encyclopedias on the bankruptcy schedules, but did report it on his fire insurance claim, he replied his counsel advised him: "If they come in on it later you have to release it. *If they didn't*...if they claim a security in it they had to prove it ..." (R.48, lines 11-15).

There is no evidence that the Paynes ever brought to the Trustee's attention either (1) the items which they disclosed for insurance purposes but did not disclose in bankruptcy or (2) the fact that they had received any monies as actual cash value for the unreported — or for the reported — items which were lost in the December 1981 fire.

In its order of January 4, 1983 at p.3, the Bankruptcy Court implicitly found the Paynes did not fully disclose the nature and extent of their personal property on their bankruptcy schedules. (Pet. Br., A-4) The Paynes appealed to the District Court from the Bankruptcy Court's ruling. In its Order of August 14, 1984, the District Court found the Paynes failed to disclose certain assets on their bankruptcy schedule. (Pet. Br., A-8)

The Seventh Circuit Court of Appeals affirmed, remanding to the district court to include full insurance proceeds for the family's clothes as required under Illinois law.

The Court of Appeals found:

> The Paynes' list did not put the trustee on notice. ... A more accurate listing might have provoked investigation. The Paynes concede that even by their methods of valuation an accurate schedule would have revealed more than $2,000 of assets and that the trustee might well have found

> it worthwhile to take and sell several items. By filing an incomplete form, the Paynes forestalled an inquiry they knew lay in store. The legal result is a limitation on the value they may receive for assets in these categories.

(Opinion, Petitioner's brief, Appendix p. A-16).

Further facts will be referred to below, as necessary to understand the Argument.

ARGUMENT

Respondent Charles R. Wood respectfully submits that the Petition for Writ of Certiorari should be denied. The Seventh Circuit correctly ruled that insurance proceeds for personal property which the debtor did *not claim* as exempt were *part* of the bankrupt's estate. As will be shown below, the debtor already has been awarded sums in excess of that allowed under applicable state statute. In addition, the debtor failed to disclose relevant assets even though he knew the schedule of asserts he filed in bankruptcy was grossly inaccurate.

The long-standing rule in bankruptcy is that all property of the debtor becomes part of the bankrupt's estate at the commencement of bankruptcy proceeding. 11 U.S.C. sect. 541. *See generally, United States v. Whitting Pools, Inc.*, 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed.2d 515, 521-522 (1983). The bankrupt party has a right to claim certain property as exempt from the estate, under the provisions of 11 U.S.C. sect. 522. Upon the failure of a debtor to claim property as exempt, the property goes to the Trustee for the benefit of the creditors. *In re Friedrich,* 100 F.2d 284 (7th Cir. 1900); *Gardner v. Johnson,* 195 F.2d 717 (9th Cir. 1951); *In re Guerrero,* 30 B.R. 463 (N.D.Ind. 1983). This is true regardless of whether the property *might* have been successfully exempted, had the debtor asserted such a claim. *In re Elliott,* 31 B.R. 33, 35 (S.D. Oh. 1983), *citing* sections 541 and 522(b).

In this case, the Bankruptcy Court first apportioned to the Paynes the $3,664.00 in proceeds attributable to property acquired after their filing of the petition in bankruptcy. The Bankruptcy Court then placed the Paynes' property into one of three groups: (1) insurance proceeds from items listed as exempt; (2) insurance proceeds from durable goods that had been listed only by category, eg., furniture, dishes, and clothing. The property in Group 1 went to the Paynes. Property in Group 2 went to the Trustee. Property in Group 3 went to the Paynes in

the amount listed, no more. The balance of the proceeds went to the trustee. This allocation was clearly within the Bankruptcy Court's broad discretionary power to allocate assets.

I. The Paynes Are Not Entitled To Recover Insurance Proceeds On Personal Property In Excess Of Statutory Limits

The Paynes' first contention, that they should recover additional money for their family's personal possessions and from the proceeds of their casualty insurance policy, must be rejected. As will be shown below, not only have the Paynes received their statutorily allowed exemptions, but they now mistakenly seek to recover insurance proceeds on personal property they themselves did not undertake to disclose or to list as exempt, as statutorily required. The Paynes neglected to list any such insurance in the bankruptcy proceedings, or to disclose such proceeds as they received after the fire.

The relevant applicable Illinois statutory limit on exemptions for the debtor *who is the head of a family* and resides with them is $1,000.00. Ill. Rev. Stat. Ch. 52, Sect.13(c) (1981). This $1,000 limit was expanded by the Illinois legislature to $2,000 in 1982. Ill. Rev. Stat. Ch.110, Sect.12-1001(b). The Paynes are simply mistaken in asserting that the bankruptcy laws fail to account for possessions of the debtor's *family*. On the contrary, sect. 12-1001(b) and its predecessor, sect. 13, specifically provide for such exemptions. The courts below have allowed the Paynes to retain the value of personal property in excess of the $2,000 limit.

Neither Chapter 52 nor its successor, Chapter 110, allows recovery of insurance proceeds in amounts in *excess* of amounts allowed under the statutory exemptions. This may be illustrated by reference to the homestead exemption. The Illinois legislature specifically provided for the disposition of insurance proceeds on property exempted as a *homestead,* stating that "such insurance money shall be exempt *to the same extent* as the building would have been had it not been destroyed." Ill.

Rev. Stat. Ch.110, sect. 12-907. (emphasis supplied.) The legislature did *not* provide for the retention of insurance proceeds on personal property claimed as exempt. See Ill. Rev. Stat. Ch. 110, sections 12-1001 - 12-1005. Accordingly, insurance proceeds on personal property claimed as exempt fall within the section 12-1001(b) exemption for the debtor's equity interest, *not to exceed $2,000 in value, in any other property.* Insurance proceeds in excess of the limits allowed under Chapter 52 and 110 are non-exempt. *See, e.g., Lewis v. Thompson,* 30 B.R. 741 (M.D.Pa. 1983) (Lewis III).

Even if the debtor may retain insurance proceeds up to the exemption limit, the debtor's recovery extends only to the insurance proceeds on *exempt* property; insurance on non-exempt property remains with the Trustee as part of the estate. *Lewis v. Thompson,* 30 B.R. 741 (M.D. Pa. 1983). The facts of the *Lewis* case are analogous to the facts in the instant case in that the debtors there had filed bankruptcy schedules that were inaccurate, and they, too, had a fire in their home soon after filing for bankruptcy. Unlike the Paynes in this case, however, the debtor in *Lewis* promptly amended his bankruptcy schedule when he discovered the disparity between the bankruptcy schedules and his insurance proof of loss forms. Here, the Paynes did not disclose the insurance or the proceeds to the court. Nor did they amend their schedules. Instead, the Paynes undertook the risk to see if the Trustee "would come in on" the inaccuracies, which occurred when the insurance company contacted the trustee regarding disposition of the insurance proceeds.

In *Lewis,* the court held that only insurance proceeds on property exempted by the debtor could be retained, even though there was no finding of fraud in that case. *Lewis v. Thompson,* 21 B.R. 282, *modified* 28 B.R. 351 (reversing finding of fraudulent concealment), *modified* 30 B.R. 741 (limiting debtor to insurance proceeds on exempt property) (M.D. Pa. 1983). Amounts in excess of the State statutory exemption are, by definition, non-exempt.

In this case, the Paynes do not deny that they failed to disclose all of their assets in the bankruptcy proceeding, nor do they deny that they failed to amend their bankruptcy schedules when they made their second list of personal property for insurance claims, and knew that the Schedule B-2 was grossly inaccurate. In addition, the Paynes do not deny that they retained insurance proceeds up to the full statutory exemption under Ch. 52, Sect. 13, as amended by Ch. 52, Sect. 12-1001(b). Since the Paynes received the full exemption allowed — and more — for their insurance proceeds even though they failed to report the policy or the proceeds thereon to the Bankruptcy Court, they should not now be heard to complain.

II. The Decisions Below Do Not Create Uncertainty Among Those Filing Petitions In Bankruptcy As To The Specificity Required In Filling Out Schedules; Nor Do They Impermissibly Impose A Penalty Without A Finding Of Fraud.

The Paynes have mischaracterized this case by challenging the appellate court's decision as a *penalty* for failing to "itemize every dish and fork." Instead, this is a case in which the debtors knowingly undertook to underestimate the value of their goods, to fail to disclose, and to omit items from their bankruptcy schedules altogether. As shown above, the Paynes have received their allowable statutory exemptions. Under Illinois law, they are not entitled to receive more. The facts of this case do not warrant further review.

The Paynes do not deny that the bankruptcy rules define property of the estate and specify what property becomes property of the estate. See 11 U.S.C. sect. 541 (1978). Nor do they deny that 11 U.S.C. sect. 522 permits a debtor the exemptions to which he or she is entitled under other Federal law and the law of the State of his or her domicile, and *requires* the debtor to file a list of property claimed as exempt. Those exemptions in this case are governed by Ill. Rev. Stat. Ch. 52, sect. 13 (1973) amended as Ch. 110, sect. 12-1001 et seq. (1982). *This appeal*

does not involve a challenge to the validity of any of the above cited rules.

The Paynes' contention that the Bankruptcy Court has no authority to issue an order or judgment under 11 U.S.C. sect. 105 finding that assets neither properly disclosed nor claimed as exempt belong to the estate rather than to the debtor, *unless* the court enters a finding of contempt of court, is patently wrong.

The Paynes do not deny their non-disclosure, their failure to amend, or their receipt of exemptions within the applicable statute. The Paynes concede that an accurate schedule would have sold for the benefit of the estate. See Pet. Br. p. A-16. In light of the circumstances, the Paynes have failed to show how the result in this case improperly imposes a "penalty" or in what ways the bankruptcy rules fail to make clear just what they should have reported to the Bankruptcy Court, but did not.

The Paynes should not be allowed to hide behind the "fresh start" policy as a justification for their failure to comply with the very bankruptcy regulations under which they now seek protection. Since the court decided to allow recovery to the Paynes rather than to revoke Paynes' discharge altogether, no finding of fraud was required. As pointed out by the Seventh Circuit in its opinion below:

> The omission of assets may be a good reason to deny or revoke a discharge. 11 U.S.C. sect. 727; Thomas H. Jackson, "The Fresh Start Policy in Bankruptcy Law" 98 *Harv. L. Rev.* 1393, 1440-46 (1985).

The authorities which discuss the rationale behind the fresh start policy clearly delineate between instances such as this, where the debtor admits to withholding information from the trustee, hoping the trustee "wouldn't come in on it," and those instances where the debtor, in full compliance with the spirit and letter of the applicable regulations, honestly seeks to marshall

his debts and assets. Those authorities uniformly hold, as did the Seventh Circuit in this case, that duplicity and withholding of information are contrary to the purposes of the Bankruptcy Code and should not be rewarded.

CONCLUSION

The Seventh Circuit correctly applied the relevant State statute regulating exemptions for personal property and properly held that the insurance proceeds from items not disclosed or not claimed as exempt go to the estate. The Seventh Circuit's decision is not in conflict with other federal courts of appeal or this Court, and does not involve any important question of federal law that requires review by this court. The Petition for Writ of Certiorari accordingly should be denied.

Respectfully submitted,

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